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THE SUBMISSION OF THE

WINDSOR ESTATE PLANNING COUNCIL

TO THE

ONTARIO COMMITTEE ON TAXATION

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SECTION 1

The Windsor Estate Planning Council was formed in 1963 and has a membership made up of lawyers, chartered accountants, trust officers and chartered life underwriters. The organization is similar to other such organizations in the Province and its purposes are generally to consider matters of estate planning and techniques with respect thereto. As one of the fundamental considerations in estate planning must always be the implications of succession duty and estate tax the Council is very much interested in the revisions to the Succession Duty Act of the Province of Ontario.

It is not the intent of the Windsor Council to offer any broad view of the Ontario Succession Duty Act or to consider the general principles of the legislation, but the Council is more concerned in bringing to the attention of the Committee certain specific aspects of the existing Succession Duty Legislation which, in this Council's opinion, should be varied or amended for a variety of reasons.

SECTION 2 - MATTERS OF GENERAL APPLICATION

1. The Windsor Council suggests the following two questions of general application. The first concerns itself with the matter of the tax rate, and the second concerns itself with the matter of duplication in administrative process.

2. In any death tax legislation a fundamental question must necessarily be the rate of tax. This is of concern to the Revenue in terms of providing funds to meet the cost of Government services and it is important to the taxpayer who is called upon to make the payment. Arriving at the rate of tax will undoubtedly be somewhat arbitrary and certainly there are a number of considerations to be reviewed. While the following are by no means exhaustive it is suggested by the Windsor Council that the Committee in reaching any

conclusions on this point should have reference to the following:

(a) In recent years it has become increasingly evident that successful businessmen reaching their retirement age have taken steps to sell their businesses; this is particularly true in closely controlled corporations. All persons having anything to do with matters of estate planning are familiar with these problems and are often forced to advise clients to take the major step in selling a successful business for a variety of reasons, amongst them the determination of the value at which the estate will be taxed, provision of liquidity for the payment of tax and as well, lessening the impact of tax as the matter of the contest over evaluation would have been avoided. The real point then to be determined is whether the amount of succession duty tax recovered on smaller estates (particularly in light of the costs of administration of securing the tax) warrants the drastic results that have arisen and the dislocations that occur with owners and employees in the force sales of small businesses. The Windsor Council submits that the amount of succession duty tax recovered on an estate of less than $100,000.00 certainly does not warrant these fundamental dislocations;

(b) It is true that tax is raised for the purpose of the general Revenue and to pay for the cost of Government services. There must always be raised, however, the question whether or not the incidence of the tax is levied too heavily upon some one or more taxpayers. In the opinion of the Windsor Council the present incidence of Ontario succession duty is levied too heavily upon immediate members of a deceased's family, that is to say, widows and children. There seems little point in creating a burden of taxation which will ultimately create a burden upon the State. The primary problem facing the Government of this Province and the residents of the Province is in the field of higher education. The Government must find ways

to provide the facilities for education and the child of today must achieve a high rate of technological skill if he is to look forward to continued employment. It does not make sense then to raise a tax upon an estate so heavy that the deceased's children cannot be provided with an adequate education from the monies left by the deceased, but must look to the State for bursaries, which are being provided by the State out of tax monies. It is submitted that in determining any tax rate concerning immediate members of a deceased's family the Province should, in every possible way, encourage families to educate their own children at their own cost rather than at the cost of the Province; and the Province should not penalize the prudent deceased who, through life insurance or business activity or otherwise, has created a reasonable fund for the protection and education of his family;

(c) In determining the rate of tax consideration must be given to the purchasing power of the dollar in the 1960's. In 1939 succession duty (at least so far as the preferred classification was concerned) was not levied unless an estate exceeded $25,000.00. In the 1940's this amount was increased to $50,000.00 and in the 1960's the Government has attempted to provide certain relief to preferred beneficiaries. Presumably, the basis of the increased exemption has been related to the decreasing value of the dollar. As a specific example, while $100,000.00 may appear to be a substantial sum of money as a capital fund when treated from the point of view of income production it will not realize much more than $5,000.00 prudently invested. With present day costs, present day purchasing power and the requirement for the degree of education which present day technology demands such an income to a widow and children is certainly not excessive and can hardly sustain the impact of both a succession duty and a continuing income tax during the life of the widow;

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(d) In determining the basic exemption, the Windsor Council submits that the exemptions should be clear and simple. The present day exemptions for estates in excess of $50,000.00 are not only hopelessly complicated, but are not in fact true or real exemptions being fixed in their amount.

With these thoughts in mind, the Windsor Council submits to the Committee that -

(a) All estates under $100,000.00 of net taxable value in which the beneficiaries are of the preferred classification should be exempt from tax;

(b) In all estates wherein the beneficiaries are of the preferred class and the estate exceeds $100,000.00 in net taxable value that the first $100,000.00 thereof, together with $20,000.00 for each dependent child of the deceased should not be subject to any tax whatsoever;

(c) With respect to estates left to other than preferred beneficiaries no tax should be levied upon any estate having an aggregate net value below $50,000.00 and that the first $50,000.00 thereof should be exempt from any tax whatsoever.

SECTION 3 - DUPLICATION

1. It may not be altogether so apparent in Toronto, but in areas outside of Toronto the duplication of services and procedures for the recovery of Ontario succession duty and Federal estate tax is marked. It is extremely difficult to explain to a taxpayer why the duplication should occur, why there should be a difference between the recovery of estate tax and succession duty and why there should be a difference in evaluations upon which tax is levied. The taxpayer views it simply that -

(a) There is an additional cost to the Province and to the taxpayer in the legal and other costs that he has to pay in settling his affairs with both jurisdictions;

(b) He sees that the matter of personal income tax has been resolved between the Federal and the Provincial Government upon a single collection basis and cannot understand why there should be any distinction between succession duty and estate tax;

(c) He finds it very difficult to understand why the same property should have a different value to two different taxing authorities arising out of the same death.

2. Practitioners in estate planning find the present system most disturbing indeed not only for the foregoing reasons, but because of the delays occasioned from the centralizing system used by the Ontario Succession Duty Office. Since succession duty matters are handled solely from Toronto (with some field work by realty valuers only) administration of an estate through the Ontario office is very much slower than through the Federal office and often necessitates undue and extra expense to travel to Toronto for the purpose of settling the affairs of the estate.

3. The Windsor Council proposes the implementation of the following. These proposals are put forward in their order of desirability.

(i) The Province of Ontario rent the field of succession duty to the Federal Government;

(ii) That the Province of Ontario impose its Succession Duty Act, but enter into an agreement with the Federal Government providing for the administration of the Act by the Federal Government through its district taxation offices;

(iii) Failing either of the foregoing proposals that the Provincial Government and the Federal Government enter into an agreement whereby valuations of property determined by the district taxation offices of the Federal Government will be accepted for the purposes of both the Estate Tax Act and the Ontario Succession Duty Act.

SECTION 4 - SOME SPECIFIC POINTS

1. It is difficult to understand the necessity for the complicated forms presently involved under the Ontario Succession Duty Legislation. The Affidavit of Value and Relationship is long, is cumbersome and is extremely difficult for the taxpayer to understand. Particularly is it difficult for him to understand when viewed in relation to the Federal Estate Tax form, which is extremely simple in its makeup. Ontario forms should therefore be streamlined.

2. Present Ontario Succession Duty Legislation brings into tax all gifts inter vivos made during the five years preceding death while the Federal Estate Tax Legislation brings into tax only those gifts inter vivos made during the three years preceding death. While presumably there is no special virtue in either of five years or three years, it is suggested that the implementation of a three year period will provide sufficient protection to the revenue against testators disposing of their property by gift prior to death. It is recommended that the Ontario Act be brought into line with the Federal Act in this case.

3. The Federal Estate Tax Legislation provides for quick succession relief in the event of a sudden death during the five years after the death of a deceased person. It is submitted that this same relief should be given under the Ontario Succession Duty Act for reasons that are obvious.

4. In 1962 for the first time in many years, we observed a substantial fall in the stock market. Undoubtedly, therefore, there were estates whose assets were valued as having substantially higher values at death than at the realization period. Our present legislation does not permit the establishment of alternative valuations but it is submitted there is no equity in taxing an estate at an artificially high figure which may have been reduced in reality by an unexpected turn of events. It is submitted that the principal of alternative valuations such as is used in the United

States of America should be implemented in the Ontario Succession Duty Legislation, that is to say, that the estate representatives may be entitled to choose either the date of death, a subsequent date fixed by legislation, or if the properties have been disposed of between those dates the date of disposition and the value thereat. It is submitted that the alternative valuation date should not be at a period more than one year after death.

5. The allowance or deductions for debts presently is related only to debts incurred before death other than a small $100.00 allowance for legal costs. The complications of present day estates requires, in the interests of the taxpayer, the use of competent legal assistance and competent executors. The engagement of competent legal assistance and of competent executors necessarily involves a cost which is directly related to the fact of death and arises only out of the fact of death. It is submitted that as in the United States there should be included in the allowance for debts reasonable legal costs and executors' compensation. It is suggested in this case that a statutory allowance could be created related to the value of estates in the same way as the present tariff existing for solicitors under the Surrogate Courts Act. Such a tariff could provide as an allowance for debts in respect of legal costs the tariff charges set out in the existing Surrogate Courts Tariff, together with allowances for other matters such as those concerning the settlement of tax according to the value of the estate and in addition, could provide a tariff for executors' compensation based upon the value of the estate.

SECTION 5 - CERTAIN SPECIAL QUESTIONS

1. The first special question concerns the taxation of joint tenancies of real property and as opposed to the taxation of tenancies in common of real property. The only important difference between a joint tenancy and a tenancy in common from a legal point of view is what is known (not too accurately perhaps) as the right of survivorship. In the joint tenancy the surviving joint tenant achieves the unquestioned title to the whole of the property, while

in a tenancy in common the share therein of the deceased person is transmitted by devolution. From an economic point of view, there is no difference whatsoever since any joint tenant or any tenant in common may call upon the Court for the partition and sale of the real property and the economic value of the result will be the same in either holding. As a consequence, it is difficult to understand why, if the economic value is the same, there should be a different tax treatment, but at the present moment if a deceased person was in joint tenancy of a parcel of real property, then the survivor to the property must prove actual contribution (again underlining the question of economic value) while the same ruling does not pertain to a tenancy in common. In addition, by reason of the existence of this unusual and unnecessary rule, unusual methods are taken in estate planning to avoid the result.

For example, if the husband should sell an undivided one-half interest as a joint tenant in real property to his wife taking in satisfaction of the consideration therefor promissory notes subsequently cancelled through a gift program, the wife will not, in the opinion of the Treasurer of Ontario, be deemed to have made a contribution so that the whole value of the real property will be taxed in the estate of the husband. However, if the wife, in fact, purchased an undivided interest as a joint tenant in the real property paying her husband by cheque one-half of the economic value thereof, then even though she may have been given a gift of cash in a like or greater amount by her husband she will have, in fact, have made an economic contribution to the acquisition of the real property and therefore one-half only of the value of the real property will be taxed in the husband's estate. This can only be regarded as a distinction without a difference.

Furthermore, if a husband were to convey an undivided one-half interest in his real property to his wife as a tenant in common so that they shared thereafter equally as tenants in common

and the wife were to pay for her one-half interest therein the consideration by way of promissory notes subsequently forgiven the question of contribution does not arise and one-half only of the value of the estate becomes subject to tax. In light of the fact that the joint tenant of the same property and the tenant in common of the same property would enjoy the same economic interest therein it is difficult to understand why there should be a difference in the taxation result.

It is submitted most strongly therefore that the long standing provisions concerning the taxation of joint tenancies should be eliminated and the question of contribution as a test discarded. It is submitted that the Act should -

(a) Tax the actual interest of the deceased person in the real property as evidenced by his ownership; and

(b) Tax as a gift any disposition by the deceased in his lifetime of an interest in the real property to another person if it occurred within the three year period prior to death.

2. Under the present Succession Duty Legislation the taxation of the proceeds of insurance policies is related solely to a premiums test, that is to say, the issue in all cases is by whom were the premiums in respect of the insurance policy paid. Quite a different test is employed under the Estate Tax Act of Canada the real issue under the Estate Tax Act being one of ownership, that is to say, the question is simply "did the deceased have any ownership rights in the policy of insurance in question?" It is difficult to reconcile the differences in approach, particularly (as in the matter of joint tenancies) of the methods used to avoid the impact of this approach and the existence of the right to tax gifts made within the appropriate period prior to death.

Under The Ontario Act if the wife of a deceased was unquestionably the owner of the policy of insurance, but the husband paid the premiums with respect thereto, the proceeds of the policy

would be taxed in the hands of the deceased's estate while, under the Estate Tax Act, the proceeds of the policy would not be taxed. However, if, in fact, the wife made the premium payments, then, although she may have received cash gifts from time to time of which part were used for the insurance premium payments the proceeds of the policy of insurance would not be taxed in the hands of the deceased as he did not contribute to the payment of the premiums. As the Committee well knows, the latter program is a well-established one in estate planning. It is therefore extremely hard to understand why taxpayers should be put to this complicated device to avoid the impact of tax under the Succession Duty Act of Ontario when the more simple and straight-forward tests are applied under the Estate Tax Act. It is submitted strongly then that the Ontario Act should be brought into line with the Federal Act in this regard.

3. The Windsor Council is naturally conscious of its border relationships with the United States of America and particularly with the citizens thereof. Many Americans summer every year in Essex County and many Americans maintain permanent homes in Canada. This is undoubtedly true in any area of the Province which touches upon the border and is not therefore purely local to Windsor. Nevertheless, one of the problems that faces American residents in establishing homes here is the impact of succession duty, particularly where, as under our present legislation, the rate of tax levied upon the residence property of the deceased American is related to the value of his world estate. Under the Federal Estate Tax Act, of course, the tax is related only to the value of the Canadian assets and broadly speaking therefore the American resident and his wife have a reasonably substantial basic exemption under the Federal Act for property jointly owned by them, which is not available to them in the Ontario Act. The Windsor Council is of the opinion that there would be a very marked increase in house sales if taxation relief on death were provided under the

Ontario Act. Windsor Council therefore submits that the Ontario Act should be amended to provide that the matrimonial residence (or residence of a widower or single man in that event) of a United States citizen domiciled out of the Province be totally exempt from any tax under the Ontario Succession Duty Act.